STATE OF MICHIGAN

COURT OF APPEALS

TOWNSHIP OF BLAIR, Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED October 27, 2011
V	No. 296661
LAMAR OCI NORTH CORPORATION, Defendant/Counter-Plaintiff-Appellant.	Grand Traverse Circuit Court LC No. 2009-027323-CZ

Before: STEPHENS, P.J., and SAWYER and K. F. KELLY, JJ.

PER CURIAM.

In this action to abate an alleged nuisance per se, defendant Lamar OCI North Corporation appeals as of right the trial court's judgment in favor of plaintiff Blair Township. We affirm, and lift the stay previously imposed.

Defendant leases property known as 468 US 31 South and 273 US 31 South on which it maintains commercial billboards. A billboard located on 468 US 31 was a "double decker" billboard, i.e., a two-level sign, installed prior to enactment of the relevant ordinances in the Blair Township Zoning Ordinance (BTZO) in 2005. The billboard was a non-conforming use under the BTZO because the display area exceeded 300 square feet, its height exceeded 30 feet, and it was located closer than 2,640 feet from another billboard.

In December 2008 defendant removed the upper portion of the sign and installed an LED display face on the remaining board. While these changes eliminated the nonconformities in display area, the double decker face, and height, the distance between the billboard and other signs did not change. Defendant did not contact plaintiff before making changes to the billboard.

Plaintiff filed suit claiming that the billboard, which was a pre-existing nonconforming use, constituted a nuisance per se. Defendant filed a counter complaint alleging that the spacing requirement between signs violated the First Amendment, and that the BTZO did not set forth the standards that controlled the zoning administrator's decision to approve or deny a request for a permit to change a nonconforming sign.

The trial court found in favor of plaintiff. The trial court noted that defendant's billboard pre-existed the relevant BTZO and did not conform in three ways: the sign surface was too

large, the height exceeded that allowed, and the billboard was located within 500 feet of other signs. The trial court found that the new billboard complied with the BTZO as to display surface area and height, but still violated the ordinance in terms of proximity to other billboards. The trial court found that a portion of section 20.08.2 was facially invalid under the First Amendment as the standards it set out for the exercise of discretion were too vague. Applying the BTZO severance clause, section 1.07, the trial court struck the final sentence of 20.08.2 from the ordinance. The trial court noted that cost of the changes and modernizations to defendant's billboard exceeded 30 percent of the replacement cost of the old billboard. For that reason, and because the changes did not remove all nonconformities, the trial court held the billboard violated the zoning ordinance.

The trial court entered a judgment finding defendant's billboard to be a nuisance per se, and ordering defendant to remove it within 21 days. The judgment provided that if defendant sought appellate relief the billboard could remain in place and need only be turned off pending resolution of the appeal. The trial court dismissed defendant's counterclaim with prejudice.[1]

Defendant first argues that Michigan law prohibits plaintiff from restricting the modification of a nonconforming use that reduces its nonconformities. We disagree.

We review the trial court's ruling on a constitutional challenge to a zoning ordinance de novo. *English v August Twp*, 204 Mich App 33, 37; 514 NW2d 172 (1994). The interpretation of a township zoning ordinance is question of law which we also review de novo. *Burt Twp v Dep't of Natural Resources*, 459 Mich 659, 662; 593 NW2d 534 (1999). "The general principles of statutory construction apply to the interpretation of zoning ordinances." *Macenas v Michiana*, 433 Mich 380, 397 n 25; 446 NW2d 102 (1989), citing 8 McQuillin, Municipal Corporations (3d ed), § 25.71, p 195.

Plaintiff regulates signs, including billboards, under Article 20 of the BTZO. Section 20.01 sets forth the purpose of Article 20 as follows:

> The purpose of this Article is to regulate the size, placement, and general appearance of all privately owned signs and billboards in order to promote the public health, safety, and general welfare, to enhance the aesthetic desirability of the environment, and reduce hazards to life and property in Blair Township.

The BTZO limits the display area of a billboard to 300 square feet, and the height to 30 feet. The minimum spacing required between billboards is one-half mile. Nonconforming signs, such as the one at issue in this case, are regulated by Section 20.08 of the BTZO. That section provides in pertinent part:

> If the face, supports, or other parts of a nonconforming sign or billboard is structurally changed, altered, or substituted in a manner that reduces the

[1] This Court granted defendant's motion for stay pending resolution of this appeal.

> nonconformity, the Zoning Administrator may approve the change. [Section 20.08.2.]
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> Nothing in this Section shall prohibit the repair, reinforcement, alteration, improvement, or modernization of a lawful nonconforming sign or billboard, provided that such repair, reinforcement, alteration, improvement, and modernizing do not exceed an aggregate cost of thirty (30) percent of the appraised replacement cost of the sign or billboard, as determined by the Zoning Administrator, unless the subject sign or billboard is changed by such repair, reinforcement, alteration, improvement, or modernization to a conforming structure. Nothing in this shall prohibit the periodic change of message on any billboard. [Section 20.08.3.]

"A prior nonconforming use is a vested right in the use of particular property that does not conform to zoning restrictions, but is protected because it lawfully existed before the zoning regulations's effective date." *Belvidere Twp v Heinze*, 241 Mich App 324, 328; 615 NW2d 250 (2000). A zoning ordinance permitting the continuation of a nonconforming use is meant to avoid the imposition of a hardship upon the property owner. However, the limitation on nonconforming uses contemplates the gradual elimination of the nonconforming use. *South Central Improvement Ass'n v St Clair Shores*, 348 Mich 153, 158; 82 NW2d 453 (1957). The construction of new nonconforming buildings or additions to existing nonconforming uses is not permitted. *Id*.

Defendant's argument that case law prohibits a township from barring modernization of a nonconforming use if it reduces the nonconformity is without merit. Defendant relies on *Paye v Grosse Pointe*, 279 Mich 254; 271 NW 826 (1937), and *Horowitz v Dearborn Twp*, 332 Mich 623; 52 NW2d 236 (1952). This reliance is misplaced. These cases hinged on language within the ordinances which prohibited "structural alteration" of a nonconforming use. Neither alteration/modernization constituted a "structural change" within the respective ordinances. It does not follow that modernization of a nonconforming use is allowed carte blanche regardless of the facts and the applicable zoning ordinance. This is particularly true in a case like this where the ordinance specifically controls the extent of modifications and repairs allowed.

Defendant's reliance on *Palmer v Detroit*, 306 Mich 449; 11 NW2d 199 (1943), is similarly misplaced. In *Palmer*, the plaintiff owned a one-story building that was originally operated as a public garage, and subsequently as a factory engaged in defense work 24 hours per day. During this operation the area was rezoned residential, rendering the manufacturing business a nonconforming use. The manufacturing company requested a permit to expand the size of the building, but the zoning administrator denied the request. The manufacturing company moved out of the building due to a lack of space, and the plaintiff rented the property to a cartage company. The City denied the plaintiff's request to use the property as a cartage business. Our Supreme Court reversed the finding that the owner was entitled to the permit for alterations not involving "structural changes" (which were prohibited by the zoning ordinance), or prolonging the life of the building. The *Palmer* Court noted that, "The real question is, whether the ordinance is reasonable in not permitting a higher grade nonconforming use and thus preventing total uselessness of plaintiff's property, and the destruction of the large investment therein." *Id*. at 455. The Court noted that the new business was a higher nonconforming use that

was not as objectionable as the first use, and that conformed to a greater degree than the prior use. *Id*. at 455-456.

Contrary to defendant's assertion, *Palmer* does not hold that modifications of a nonconforming use are to be allowed if it reduces its nonconformities. *Palmer* is limited to its unique facts wherein a change in permitted use prevented the building from being used, thereby destroying the investment. Here, the BTZO in no way prevents a billboard from being used or the investment destroyed.

More analogous to the present situation is the case of *Austin v Older*, 283 Mich 667; 278 NW 727 (1938), in which a gasoline station was a nonconforming use within an area zoned residential. The property owner was denied a permit to expand the structure in order to better compete with other gas stations. Our Supreme Court held that the denial was proper as "structural changes" were prohibited by the zoning ordinance even though normal business competition could, though the denial of the permit, eventually cause the plaintiff's property to be of little or no value for the sale of gasoline. The owner was still able to use the property for purposes permitted by the zoning ordinance. *Id*. at 676-677.

The BTZO does not prohibit an owner from using, modernizing, or maintaining a billboard, but rather prevents modernization only if the proposed improvements exceed 30 per cent of the replacement value. While the improvement in *Austin* was denied because the owner wished to expand the nonconforming use by making structural changes prohibited by the zoning ordinance, the *Austin* Court found no fault with the potential for the permit denial to ultimately lead to the business closing as the property owner was still able to use the property for purposes permitted by the zoning ordinance. Section 20.08.3 of the BTZO still allows a property owner to maintain, modernize, and use the billboard. The authority cited by defendant does not demonstrate that the trial court lacked the authority to abate the nuisance pursuant to section 26.02 of the BTZO. Consequently, defendant is not entitled to relief.

Defendant's next argument relates to the trial court's determination that section 20.08.2 of the BTZO is an unconstitutional prior restraint on free speech. Defendant does not challenge the trial court's decision that a portion of section 20.08.2 of the BTZO is constitutionally invalid as it grants unbridled discretion to grant or deny permits for modifications to nonconforming billboards which do not bring those billboards into full compliance. However, defendant asserts that the trial court's remedy for the violation, i.e., the striking of the second sentence from section 20.08.2 and finding defendant in non compliance with section 20.08.3 of the BTZO, constitutes reversible error. We disagree.

Section 20.08.2 of the BTZO provides:

> The faces, supports, or other parts of any nonconforming sign or billboard shall not be structurally changed, altered, substituted, or enlarged unless the resultant changed, altered, substituted, or enlarged sign or billboard conforms to the provision of this Article for the district in which it is located, except as otherwise provided in this Section.

> If the face, supports, or other parts of a nonconforming sign or billboard is structurally changed, altered, or substituted in a manner that reduces the nonconformity, the Zoning Administrator may approve the change.

The trial court applied the severance clause, section 1.07, and then determined that the final sentence of section 20.08.2 was invalid as the standards used to exercise discretion were too vague. Consequently, the trial court struck the offending sentence from the act. The trial court then noted that the cost of the changes and modernizations to the billboard exceeded 30 percent of the replacement cost of the old billboard. For that reason, and because the changes did not remove all nonconformities, the trial court held that defendant's billboard violated section 20.08.3 and ordered the nuisance be abated.

In *Jott, Inc v Charter Twp of Clinton*, 224 Mich App 513; 569 NW2d 841 (1997), this Court stated:

> The doctrine of severability holds that statutes should be interpreted to sustain their constitutionality when it is possible to do so. Whenever a reviewing court may sustain an enactment by proper construction, it will uphold the parts which are separable from the repugnant provisions. To be capable of separate enforcement, the valid portion of the statute must be independent of the invalid sections, forming a complete act within itself. After separation of the valid parts o the enactment, the law enforced must be reasonable in view of the act as originally drafted. One test applied is whether the law-making body would have passed the statute had it been aware that portions therein would be declared to be invalid and, consequently, excised from the act. [*Jott, Inc*, 224 Mich App at 547-548, quoting *Pletz v Secretary of State*, 125 Mich App 335, 375; 336 NW2d 789 (1983).]

The final sentence of section 20.08.2 can be severed from the ordinance in order to remove the portion which is unconstitutional. There is no evidence that any other section relied upon section 20.08.2. The removal of this sentence does not defeat the goal of eventually eliminating nonconforming uses. Standards remain in place for allowing modernization and repair of billboards. The valid portion of the ordinance can be read and enforced independently of the invalid portion and remains reasonable in view of the act as originally drafted. *Pletz*, 125 Mich App at 375.

Defendant argues that rather than severing the offending sentence, the trial court should have eliminated the need for discretionary permission from the zoning administrator, and left intact the ability to make any changes to a nonconforming billboard that reduce nonconformities. This argument is without merit. In making its argument, defendant erroneously relies on *Shuttlesworth v Birmingham*, 394 US 147; 89 S Ct 935; 22 L Ed 2d 162 (1969), to assert that the remedy for an unconstitutional permit scheme is to ignore it. In *Shuttlesworth*, 52 African-Americans were led out of a church by three ministers. The group marched down a street in an orderly fashion to protest the alleged denial of civil rights in the city. The police stopped and arrested the marchers for violation of an ordinance prohibiting demonstrations without a permit. The ordinance conferred upon the city commission practically unbridled discretion to prohibit any parade or demonstration guided by its own ideas of "public welfare, peace, safety, health,

decency, good order, morals or convenience." *Id*. at 150-151. The *Shuttlesworth* Court reversed the marchers' convictions, holding that it was clear to the leaders that under no circumstances would the group be allowed to demonstrate. In so holding, the Court noted:

> "It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official -- as by requiring a permit or license which may be granted or withheld in the discretion of such official--is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *Staub v. Baxley*, 355 U.S. 313, 322. And our decisions have made clear that a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license.[3] "The Constitution can hardly be thought to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality, because he has not yielded to its demands." *Jones v Opelika*, 316 US 584, 602 (Stone, C. J., dissenting), adopted *per curiam* on rehearing, 319 US 103, 104. [*Shuttlesworth*, 394 US at 151.]

Shuttlesworth is distinguishable on the facts. The BTZO places no restriction on the content of the speech; defendant is able to advertise all lawful commercial speech. Moreover, unlike in *Shuttlesworth* where the city commission made it clear a permit would never be issued, defendant here never sought a permit to modernize its billboard. *Shuttlesworth* cannot be interpreted as allowing defendant the right to ignore the ordinance requirements.

Finally, defendant challenges the requirement in section 20.07.3 that billboards be located 2,640 feet apart as constitutionally invalid. The trial court found that the enumerated purpose of the ordinance, to enhance the aesthetic desirability of the environment and reduce hazards to life and property in the township, satisfied the constitutional protections afforded commercial speech. We agree with the trial court's holding.

"The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation." *Central Hudson Gas & Electric Corp v Pub Serv Comm*, 447 US 557, 561; 100 S Ct 2343; 65 L Ed 2d 341 (1980). A restriction on protected commercial speech is reviewed under a four-prong test:

> (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective. [*Metromedia, Inc v San Diego*, 453 US 490, 507; 101 S Ct 2882; 69 L Ed 2d 800 (1981), citing *Central Hudson Gas & Electric Corp*, 447 US at 563-566.]

The burden of justifying a restriction on commercial speech is on the party seeking to uphold it. *Edenfield v Fane*, 507 US 761, 770-771; 113 S Ct 1792; 123 L Ed 2d 543 (1993).

In *Metromedia, Inc*, advertising companies filed suit to enjoin enforcement of the defendant's ordinance related to billboard advertising. The ordinance prohibited outdoor advertising display signs in order to "eliminate hazards to pedestrians and motorists brought about by distracting sign displays" and "to preserve and improve the appearance of the City[.]" *Metromedia, Inc*, 453 US at 493. The *Metromedia, Inc* Court found no issue with the first, second, and fourth prongs of the test, holding that the stated purposes of the ordinances, traffic safety and aesthetics, were substantial governmental goals. *Id*. at 507-508. The Court further noted that the defendant went no further than necessary to achieve its objectives and did not prohibit billboards outright but allowed onsite billboards and other specifically exempted signs. The Court determined that the ordinance directly advanced the governmental interests in traffic safety and aesthetics, pointing out that "billboards are real and substantial hazards to traffic safety." *Id*. at 509. Accordingly, the ordinance was found to directly advance the governmental interests of the defendant. *Id*. at 510. See also *Gannett Outdoor Co v City of Troy*, 156 Mich App 126, 132-133, 136; 409 NW2d 719 (1986) (a city's aesthetic interests are alone sufficient to justify billboard regulation; time, place, and manner restrictions were content neutral and properly imposed).

Applying the four-prong test set forth in *Metromedia, Inc*, it is clear that the BTZO's 2,640 foot spacing requirement passes constitutional muster. First, lawful commercial speech is involved. Second, the BTZO's goals of promoting aesthetic desirability of the environment and reducing hazards to life and property in Blair Township are of substantial governmental interest. Finally, the restrictions directly advance those interests and go no further than necessary to accomplish those objectives. Indeed, the requirements are less severe than those affirmed in *Metromedia, Inc*, as Blair Township does not ban billboards outright but rather restricts them based on size, placement, and general appearance. Defendant asserts that the record is devoid of proof that the distance requirement serves any aesthetic or public safety purpose. However, our courts have found as a matter of law that billboards are a substantial hazard to traffic safety. *Metromedia, Inc*, 453 US at 509. Moreover, aesthetics alone have been found to be a sufficient reason to justify billboard regulations. See *Gannett Outdoor Co*, 156 Mich App at 132-133. The trial court properly determined that the BTZO's spacing requirement was valid.

Judgment affirmed; stay lifted.

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Kirsten Frank Kelly